

ADMINISTRATIVE APPEAL OF MEANS CONSTRUCTION COMPANY ET AL.
v.
COMMISSIONER OF INDIAN AFFAIRS

IBIA 77-6-A

Decided November 5, 1976

Appeal from a decision of the Commissioner of Indian Affairs denying Indian-owned construction companies a right to negotiate a contract under the Buy Indian Act.

Docketed and Dismissed

1. Bureau of Indian Affairs: Administrative Appeals

Administrative appeals decided by the Commissioner of Indian Affairs under 25 CFR Part 2 on the basis of an exercise of discretionary authority should contain in the written decision a statement that the decision is based on the exercise of discretionary authority and that the decision is final for the Department.

2. Bureau of Indian Affairs: Administrative Appeals

It is not the function of the Board of Indian Appeals to review discretionary determinations of the Commissioner of Indian Affairs.

3. Indian Economic Enterprises: Buy Indian Act

The provisions of the Act of June 25, 1910 (36 Stat. 861, 25 U.S.C. § 47), commonly referred to as the "Buy

Indian" Act, plainly bestow discretionary authority on the Secretary of the Interior with respect to the purchase of products and labor of Indian industry.

APPEARANCES: Janice L. Hofman of Yegge, Hall and Evans, Denver, Colorado, on behalf of appellants; Stanley E. Sutherland, Office of the Solicitor, Division of General Law, on behalf of appellee.

OPINION BY BOARD MEMBER HORTON

Means Construction Company and Davis Construction Company, a joint venture which is 100 percent Indian-owned and controlled, 1/ have appealed a written decision of the Commissioner of Indian Affairs dated July 8, 1976, which denies a request of these firms that a contract be negotiated with them pursuant to the Act of June 25, 1910 (36 Stat. 861, 25 U.S.C. § 47), commonly referred to as the "Buy Indian" Act, for the construction of the Standing Rock Boarding School at Fort Yates, North Dakota. The "Buy Indian" Act states:

So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

The Commissioner submits that his refusal to negotiate a school construction contract with appellants was influenced by a formal resolution of the Standing Rock Sioux Tribal Council dated June 11, 1976, which urges the Bureau of Indian Affairs to restore the Standing Rock school construction project to the open competitive bid process. 2/ According to the

1/ As certified by memorandums from the Aberdeen Area Office of the Bureau of Indian Affairs dated May 21 and May 24, 1976.

2/ The Council's four-page resolution states, inter alia, that the Standing Rock Sioux Tribe has been working on the development of a major school design and construction program for the reservation since 1969 and that the BIA has always assured the Tribe that it would be involved in all major decisions regarding the development of school facilities at Standing Rock; that the Indian community at Standing Rock has been insistent in discussions with Tribal leaders that the highest standards of construction be implemented on the Standing Rock Boarding School to guarantee a safe, quality building; that the foregoing requirement is emphasized due to the recent failure of an Indian contractor who erected a community building on the reservation; and that it has always been thought by Tribal leaders that the most suitable way to achieve both cost efficiency and quality contractors would be through the open competitive bidding process.

Commissioner, "the policy of the Buy Indian Act was overshadowed in this instance by the policy of the Indian Self-Determination Act, P.L. 93-638 (88 Stat. 2203, 25 U.S.C. § 450 et seq.)."^{3/} The Indian Self-Determination and Education Assistance Act, supra, was enacted January 4, 1975, in fulfillment of the declared policy of Congress to provide for, inter alia, maximum Indian participation in the government and education of the Indian people; full participation of Indian tribes in programs and services conducted by the federal government for Indians and to support the right of Indian citizens to control their own educational activities.^{4/}

It is the Commissioner's position in this appeal that his decision of July 8, 1976, was based on the exercise of discretionary authority and that under the terms of 25 CFR 2.19 such decision was final for the Department. In his September 17, 1976, Answer and Motion to Dismiss, the Commissioner argues that the foregoing regulation and 43 CFR 4.353(c) preclude the Board of Indian Appeals from assuming jurisdiction in this matter.

Appellant Indian construction companies filed a response to the Commissioner's motion to dismiss on October 15, 1976, which alleges, inter alia, the following:

The very issue to be decided in this appeal is whether the Commissioner of Indian Affairs did or did not have this discretionary authority in determining whether or not to negotiate the subject contract under the "Buy Indian" Act. It is the Appellants' vehement argument that the Commissioner did not have the discretionary authority to decide whether the "Buy Indian" Act or the "Indian Self-Determination" Act should apply to this instance, but was under a mandate by virtue of the "Buy Indian" Act and the Bureau of Indian Affairs [sic] regulations and directives to negotiate the subject contract with the Appellants. [5/]

For the reasons briefly set forth below, the Board concludes that the Commissioner's July 8, 1976, decision was final for the Department and that the subject appeal must be dismissed.

^{3/} Appellee's Answer and Motion to Dismiss, filed September 17, 1976, p. 1.

^{4/} Excerpted from Act's preamble.

^{5/} Appellants' Reply to Appellee's Answer and Motion to Dismiss, filed October 15, 1976, p. 1.

[1] It is conceded by the Commissioner on appeal that his July 8, 1976, decision neglected to advise that his disposition of appellants' request for a negotiated contract was based on an exercise of discretionary authority and that the decision was therefore final for the Department. 6/ The Bureau's regulations require such a statement in decisions by the Commissioner which are not based on interpretation of law 7/ and we perceive that the absence of this statement could lead an aggrieved party to believe that a further appeal to this Board could be maintained. In addition, various references in the Commissioner's July 8 decision to the mandate of the Indian Self-Determination Act promote the possible impression that the Commissioner interpreted the Act as requiring the course of action taken by him.

However, the Commissioner has furnished the Board a sworn affidavit dated September 17, 1976, which states:

My July 8, 1976 decision in the matter being appealed was rendered in an exercise of my discretionary authority. In my judgment, the policy of the Indian Self-Determination Act in this instance outweighed the policy of the Buy Indian Act. Although I referred to the Indian Self-Determination Act as being a "Congressional mandate", I did not mean to infer that the Act legally required me to decide as I did. In using this term I was attempting to convey the great weight which I assign to the policy expressed in the Act. Although I did not specifically so state, I intended my July 8, 1976 decision to be final for the Department.

The Commissioner's clarification of his July 8 decision precludes our second-guessing the intentions of his original words. Furthermore, in our view the clarification merely reinforces a conclusion which should have been obvious to the parties, viz., that in the absence of any form of contract entered between the BIA and the Standing Rock Sioux Tribe in accordance with the Indian Self-Determination and Education Assistance Act, such Act could not be cited as a legal bar to appellants' alleged rights under the "Buy Indian" Act. In short, the only reasonable construction which is invited by the Commissioner's July 8 decision is that any reference to the Indian Self-Determination Act was merely illustrative of the source of recorded Indian policy which gave rise to the Commissioner's final judgment.

6/ Appellee's Answer and Motion to Dismiss, p.1.

7/ 25 CFR 2.19(c)(1).

[2] It is not the function of this Board to review discretionary determinations of the Commissioner of Indian Affairs. If appellants believe it was an abuse of discretion for the Commissioner to consider the policies enunciated in the Indian Self-Determination Act in disapproving their request for a negotiated contract under the "Buy Indian" Act, their recourse must be to the courts.

[3] Consistent with our holding that this appeal be dismissed for lack of jurisdiction we reject the only legal argument raised by appellants that the Bureau is under a mandate imposed by the "Buy Indian" Act and respective regulations or directives to negotiate a construction contract with them. The provisions of the "Buy Indian" Act, previously recited in full, plainly bestow discretionary authority on the Secretary of the Interior with respect to the purchase of products and labor of Indian industry.

Appellants' appeal brief strains to construe guidelines contained in 20 BIAM Bulletin 1, dated March 3, 1976, as a mandatory directive to Bureau contracting officers to negotiate needed contracts with qualified Indian contractors whenever they are located in the target competitive area. ^{8/} Neither the Bureau of Indian Affairs Manual, an internal-operations brochure not endowed with the force of law, ^{9/} nor any regulations of the Department, dictates compulsory contractual obligations between the Bureau and Indian contractors under the "Buy Indian" Act. Further, any such interpretation which might be inferred from these departmental sources could not be used to override the Secretary's statutorily-conferred right of discretion expressly set forth in the "Buy Indian" Act.

NOW, THEREFORE, in accordance with the reasons set forth above and pursuant to the requirements of 43 CFR 4.353(c) and 4.361(b) the Board of Indian Appeals hereby orders that the administrative appeal of the Means and Davis Construction Companies from the July 8, 1976, decision of the Commissioner of Indian Affairs be, and the same is, hereby DISMISSED for lack of jurisdiction. IT IS HEREBY FURTHER ADJUDGED that the Commissioner's July 8, 1976, decision is final for the Department.

^{8/} Appellants' Notice of Appeal and Appeal Brief, pp. 2-4.

^{9/} Morton v. Ruiz, 415 U.S. 199, 235 (1974).

Done at Arlington, Virginia.

Wm. Philip Horton
Member of the Board

I concur:

Alexander H. Wilson
Administrative Judge